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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

FREE KICK MASTER, LLC.)	CASE 4:15 cv 03403 PJH
)	
Plaintiff,)	JUDGE PHYLLIS J. HAMILTON
)	
vs.)	
)	PLAINTIFF'S RESPONSE TO
APPLE (I TUNES) , INC. et al.,)	DEFENDANTS' GOOGLE'S AND
)	AMAZON'S MOTION TO DISMISS
Defendants.)	UNDER RULE 12(b)(6) (AMENDED)

PLAINTIFF'S RESPONSE TO DEFENDANTS' GOOGLE'S AND AMAZON'S
MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6) (AMENDED)
(FAILURE TO STATE A CLAIM)

Plaintiff Free Kick Master LLC, by undersigned counsel, asks that the Court deny Defendants' Google and Amazon's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6). The reasons for this request are fully elaborated in the Memorandum to follow.

Respectfully Submitted,

/s/ Eugene Alkana

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CERTIFICATE OF SERVICE

A copy of this **Plaintiff's Response to Defendants' Google and Amazon's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)** has been electronically filed on CMECF and thereby served on all Defendants (Google, Amazon, Samsung Electronics America, and Apple (I-tunes)) on September 3, 2015.

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MEMORANDUM

DISCUSSION OF LAW RELATED TO FED. R. CIV. P. 12(b)(6) MOTIONS

In Graham-Sult v. Clainos, 756 F.3d 724, 748 (9th Cir. 2014), the Court summarized the standard the Complainant must meet to survive a Rule 12(b)(6) Motion to Dismiss for failure to state a claim for which relief may be granted:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, *accepted as true*, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted,[italics added])." Although for the purposes of a motion to dismiss *we must take all of the factual allegations in the complaint as true*, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Bell A. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (internal quotation marks omitted). Even when dismissal of a complaint might be warranted, Federal Rule of Civil Procedure 15(a) authorizes parties to amend their complaint " with . . . the court's leave." Fed.R.Civ.P. 15(a)(2). (Italics added).

In Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260-1261 (11th Cir. 2009), the Court stated:

A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face. *See Iqbal*, 129 S.Ct. at 1950 (explaining " only a complaint that states a plausible claim for relief survives a motion to dismiss"); *Bell A. Corp. v. Twombly*, 550 U.S. 544, 561-62, 570, 127 S.Ct. 1955, 1968-69, 1974, 167 L.Ed.2d 929 (2007) (retiring the prior " unless it appears beyond doubt that the plaintiff can prove no set of facts" standard). In *Twombly*, the Supreme Court emphasized a complaint " requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. Factual allegations in a complaint need not be detailed but " must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555, 127 S.Ct. at 1964-65 (internal citations and emphasis omitted).

More recently, in [*Ashcroft v. Iqbal*, [556 U.S. 662, 129 S.Ct. 1937 (2009)], the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand " more than an unadorned, the-defendant-

unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949. A complaint must state a plausible claim for relief, and " [a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss. *Id.* The well-pled allegations must nudge the claim " across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974.

APPLICATION TO COUNT I AND COUNT II
OF THE PLAINTIFF'S SECOND AMENDED COMPLAINT

The allegations in the SAC with which Defendants Google and Amazon take issue are:

19. Defendant Amazon operates a marketplace, the "Amazon Appstore," , through which owners of Kindle "Fire" devices can purchase programs or "apps" to use with those devices. Amazon, advertises the Free Kick Master Challenge APK for Kindle, as the " Top APK" for Kindle Fire. **See Exhibit VI.** These games are also a click away for users for its trademark to be used in connection with those downloads.

20. Defendant Google, Inc., operates Google Play, a distribution platform that was created and operates to serve as the marketplace and office online store to purchase applications for the Android operating system. Google allows developers of apps (programs) for Android mobile devices to distribute those apps, including "Free Kick Master" apps, to android device users. Google has never asked permission from Plaintiff to distribute "Free Kick Master" apps to its customers for free or otherwise.. (**See Exhibit VII**).

.....

23. Defendants Apple, Amazon, Google, and Samsung's, use, sale, distribution, and /or promotion of the various "FREE KICK MASTER" apps and games in the State of California and the rest of the world is without authorization or consent from the Plaintiff.

24. Defendants' use, distribution, and/or promotion of "Free Kick Master" apps and games causes a likelihood of confusion, mistake or deception in the minds of the public.

Under Plaintiff's Count I of the SAC, invoking 15 USC 1114,

(1) Any person who shall, without the consent of the registrant—

(a)

use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b)

reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided....

Under Plaintiff's Count II of the SAC, invoking 15 USC 1125(a):

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

As stated above, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, *accepted as true*, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Also, “[f]actual allegations in a complaint need not be detailed but " must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell A. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007). In the instant matter, Plaintiff Free Kick Master LLC made factual allegations regarding Amazon’s and Google’s use of its trademark and/or placement of goods/services using its trademark on their websites. Plaintiff also supplemented those allegation with actual exhibits taken off of the internet to demonstrate that such uses by the Defendants were not “speculative” or theoretical, but actually existed on real webpages. This was in order to dispel any allegation that the whole SAC was nothing but a fabrication or “a formulaic recitation” of the elements of a cause of action.

Defendants complain that Plaintiff makes “no allegation that Amazon or Google had any notice regarding any infringement,” (Doc. 63, page 9, line 13). They also complain that Plaintiff did not allege that they had any “knowledge.” (Doc. 63, page 9, line 8, 12). This seems to ignore the fact that Plaintiff specifically alleges in the paragraph 37 of the SAC, that “[u]pon

information and belief, Defendants' acts have been willful, deliberate, and intended to interfere with Plaintiff's use of the FREE KICK MASTER mark." The obvious conclusion is that if Defendants indeed possessed no knowledge or notice, then they could not have deliberately interfered with Plaintiff's trademark and their acts could not have been deliberate and intentional. As stated in the **DISCUSSION OF LAW ABOVE**, the "factual allegations [supplied by Plaintiff] need not be detailed" and thus need not cover absolutely every instance and type of infringement. Generally, Plaintiff would argue, such details would be worked out during Discovery process.

At this point, it would probably be informative for all concerned for Plaintiff to address the extent of knowledge and control Defendants Amazon and Google had or should have had about the character of the products (including infringements) they advertised and provided to the public.

In the case of Defendant Amazon, **Exhibit I** (Amazon Apps & Services Developer Portal) demonstrates the degree of control Defendant Amazon has over the development of apps and programs. In addition to receiving 30% of the revenue ("revenue split," **Exhibit I**, page 1 of 28), Amazon:

---"*...promotes your apps* by using commerce and marketing features such as search and search refinement, browse, and recommendations based on customers own purchases."

(**Exhibit I**, page 1 of 28);

---approves apps (“In addition to submitting apps and checking their *approval status* . . . ,” (Exhibit I, page 2 of 28);

---“...test[s] submitted apps prior to making them available to verify that each works as outlined., does not impair the functionality of the mobile device...and complies with the terms of the App Distribution and Services Agreement and [Amazon’s] content guidelines..,” (Exhibit I, Page 4 of 28);

--- requires the submission of “minimum assets,” including a “small icon,” “a thumbnail,” “a minimum of three screenshots that accurately depict your app,” and “a promotional image.” (Exhibit I, page 4 of 28);

--- Amazon’s “Developer Portal” tests the app for “compatibility” and tests the app on “real Devices.” (Exhibit I, page 3 of 28);

--- Amazon prepares the app by “wrap[ping] your binary with code that allows Amazon to enforce...[its] DRM... collect analytics related to the app, evaluate and enforce [its] program policies....” (Exhibit I, page 6 of 28);

---requires that “each app you submit...adhere[s] to the following content guidelines: *if [Amazon] determines that an app contains, facilitates or promotes content prohibited by these guidelines, [Amazon] will reject [the] ...app submission...*” Prohibited content includes “offensive content,” “pornography,” “illegal activity,” “gambling with real currency,” *intellectual property infringement*: [Amazon]..prohibit[s] any app to which you do not have The necessary rights to make available in Amazon or that violates ...[Amazon’s] copyright

policy..” **Exhibit I**, page 8 of 28); (Italics added);

--- “hold[s] personal privacy in the highest regard...*[Amazon] prohibits apps that infringe or have the potential to infringe upon an individual’s privacy....Celebrity images and/or celebrity names cannot be any be used for commercial purposes without the permission of the celebrity...*” (**Exhibit I**, page 8 of 28); (Italics added).

---requires that “you have ownership or license rights to the code and content ...included in any app...” (“Copyright Policy”), **Exhibit I**, page 8 of 28;

---allows apps already available on Google Play ; provides the option to apply Amazon’s DRM technology; (**Exhibit I**, page 12 of 28); and Defendant Amazon

---considers placement of apps for “featured market placement,” such as “Highly Rated apps and games”; **Exhibit I**, page 18 of 28.

Defendant Amazon boasts a very strict “anti-counterfeiting” policy: “The sale of counterfeit products, including any products that have been illegally replicated, reproduced, or manufactured, is strictly prohibited.” Also “ [Amazon is]...constantly innovating on behalf of [its] ...*customers and working with ...content owners, vendors, and sellers to improve the ways [it]...detects and prevent counterfeit products....*[Amazon] encourages anyone who has a product authenticity concern to notify [it].. and [it] will investigate it thoroughly and take any appropriate actions.” (See **Exhibit II**, page 1). (Italics added).

Amazon also has a very strict policy on “attempts to divert transactions or buyers,” as well as a policy on “unauthorized and improper business names.” (See **Exhibit III**, page 1).

Thus, Defendant Amazon has a very strict self proclaimed policy of monitoring and weeding out infringing materials. It therefore, cannot with any credibility claim, that it had no knowledge or notice of any infringements or that it was promoting something improperly.

Defendant Google also has a manual on “publish[ing] apps on Google Play” (**Exhibit IV**, page 1). This manual teaches the app developer to: “1. Understand the Publishing Process,” **Exhibit IV**, page 1); “4. Determine your App’s Content Rating” (**Exhibit IV**, page 4 of 20); as well as other topics. Google Play Developer Program Policies provide controls on content such as restrictions on Sexually Explicit Material, Violence, Hate Speech, Sensitive Events, Impersonation, Intellectual Property, Illegal Activities and Dangerous Products (See **Exhibit V**, pp.1-3).

DISCUSSION OF LAW RELATED TO THE COMMUNICATIONS DECENCY ACT
47 USC 230 AND ITS APPLICATION TO COUNTS IV, V, AND VI OF THE SAC

Defendants Amazon and Google ask that the Court dismiss Counts IV, V, and VI of the Plaintiff’s Second Amended Complaint because they are allegedly barred by Section 230 of the Federal Communications Decency Act 47 USC 230 (“CDA”). 42 USC 230(c)(1) provides that

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).^[1]

An overall policy statement of the CDA can be found in Doe v. Internet Brands, Inc., 767 F.3d 894, 898 (9th Cir. 2014)

As the heading to section 230(c) indicates, the purpose of that section is to provide " [p]rotection for 'Good Samaritan' blocking and screening of offensive material." That means a website should be able to act as a " Good Samaritan" to self-regulate offensive third party content without fear of liability. In particular, section 230 was in part a reaction to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. S.Ct. May 24, 1995) (unpublished), a New York state court decision holding that an internet service provider became a " publisher" of offensive content on its message boards because it deleted some offensive posts but not others. [WL] at *4. Under *Stratton Oakmont*'s reasoning, a website had to choose between voluntarily removing some offensive third party content, which would expose the site to liability for the content it did not remove, or filtering nothing, which would prevent liability for all third party content. *See id.* " In passing section 230, Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete." *Fair Housing Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).... Another policy of section 230 is to " avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." *Delfino v. Agilent Techs., Inc.*, 145 Cal.App.4th 790, 52 Cal.Rptr.3d 376, 387 (Ct. App. 2006).

In Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162 -1163 (9th Cir. 2008), the Court stated that

Section 230 of the CDA^[5] immunizes providers of interactive computer services^[6] against liability arising from content created by third parties.... This grant of immunity applies only if the interactive computer service provider is not also an "information content provider," which is defined as someone who is "**responsible**, in whole or in part, for the creation **or development** of" the offending content. *Id.* § 230(f)(3). (Italics added).

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "**responsible, in whole or in part" for creating or developing**, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content....

Also, “ As [the Court]... explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)...” *Id.*, at 1165.

The Court in Fair Housing Council pointed out the Wikipedia definition of “web content development” as being : “the process of researching, gathering, organizing, and editing information for publication on websites...Our interpretation of ‘development is entirely in line with the context appropriate meaning of the term and easily fits the activities ...[Defendant] engages in.” *Id.*, at 1168. “A website operator who edits user-created content such as by correcting spelling, removing obscenity, or trimming for length retains his immunity for any illegality in the user created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner which contributes to the alleged illegality... is directly involved in the alleged illegality and thus not immune...” *Id.*, at 1169.

In Fair Housing Council, the Defendant also tried to deny “responsibility” for the content of the webpages. The Court replied: ...[Defendant] is "responsible" at least "in part" for each subscriber's profile page, because every such page is a collaborative effort between [Defendant]... and the subscriber.” *Id.*, at 1167.

In the instant matter, Plaintiff Free Kick Master would draw the Court’s back to the

prior discussion above regarding Exhibits I, II, and III (Amazon's Apps & Services Developer Portal, Anti-Counterfeiting Policies, and Prohibited Seller Activities and Actions).

Defendants Google and Amazon claim that Plaintiff "seeks to place Google and Amazon in the position of publisher and to require them to review and analyze each of the hundreds of thousands of apps created by third parties." (Doc. 63, page 6, line 23- 24). Plaintiff believes that have already done just that (in the case of Amazon by virtue of the policies and procedures presented in Exhibits I, II, and III, and in the case of Google, by virtue of the policies and procedures in Exhibits IV, and V). Furthermore, Amazon, in addition to collecting 30% of the revenue—and thereby profiting from its activities-- promises to promote the apps and programs (using various "commerce and marketing features" and "recommendations" to customers); approves the apps; makes certain that the apps work as outlined and that the apps do not impair their host devices; tests the apps for compatibility and on real devices; and supplements the binary code of the apps with its own binary code.

Additionally, Amazon strictly regulates the content of apps (censorship??); allegedly checks all apps for infringement; allegedly makes certain that the privacy of celebrities and other individuals is not disturbed; and, according to Amazon, prohibits use of illegally replicated or produced products. Amazon also directs that that the app submission be accompanied by an icon, thumbnail, screenshots, and promotional images. At the very least, all of these actions on the part of Amazon point to a truly collaborative effort between Amazon and third parties in all respects to promote the sale and marketing of computer programs and apps. Amazon's

involvement is thus much more than that of a passive displayer of third party content.

Google, from a reading of Exhibits IV and V, has similar controls over the production and of apps marketed on Google Play.

The CDA contains an exception for laws pertaining to “intellectual property.” Specifically, 47 USC 230 (e)(2) states that “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” It is true that the Ninth Circuit held in *Perfect 10, Inc., v. CCBill, LLC*, 488 F.3d 1102, 1119 (2007) that “we construe the term intellectual property to mean ‘federal intellectual property’.”

However, In *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, 998 F.Supp.2d 890, 897- 898 (C.D.Cal. 2014), the Court considered Plaintiff’s causes for “ (1) **trademark infringement**, (2) unfair competition, and (3) false designation of origin under the Lanham Act, 15 U.S.C. § § 1114 & 1125, and under California law...” The Court stated:

This Court analyzes these claims together for the purposes of this Motion. " [T]he courts have uniformly held that common law and statutory **trademark infringement** are merely specific aspects of unfair competition." *Hokto Kinoko Co. v. Concord Farms, Inc.*, 810 F.Supp.2d 1013, 1031 (C.D. Cal. 2011) (citing *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)); see also *Grey v. Campbell Soup Co.*, 650 F.Supp. 1166, 1173 (C.D. Cal. 1986) (" *The tests for **infringement** of a federally registered mark under § 32(1), 15 U.S.C. § 1114(1), **infringement** of a common law **trademark**, unfair competition under § 43(a), 15 U.S.C. § 1125(a), and common law unfair competition involving trademarks are the same*"). A claim for false designation of origin under 15 U.S.C. § 1125 requires proof of the same elements as a claim for **trademark infringement** under 15 U.S.C. § 1114. *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 n.6 (9th Cir. 1999) (citing 15 U.S.C. § § 1114(1) & 1125; *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979)).

Furthermore, the Ninth Circuit "has consistently held that state common law claims of unfair competition . . . are 'substantially congruent' to claims made under the Lanham Act." Cleary v. News Corp., 30 F.3d 1255, 1262-63 (9th Cir. 1994) (citing Academy of Motion Picture Arts & Scis. v. Creative House Promotions, Inc., 944 F.2d 1446, 1457 (9th Cir. 1991)).

(Italics added).

In Eurow & O'Reilly Corp. v. Superior Manufacturing Group, Inc., CV 14-6595-RSWL

(VBKx) (CACDC), the Court struck down an affirmative defense of federal preemption based upon the Lanham Act, stating:

Plaintiff's Twenty-Third Affirmative Defense asserts that Defendant's "state law claims are preempted by Federal Law including the Lanham Act because the state law claims are based upon the same conduct as the federal claim for infringement." Pl.'s Answer to Def.'s Countercls. ("Pl.'s Answer") 16:16-20. Defendant asserts state-law counterclaims of California common law trademark infringement, California common law unfair competition, and violations of the California Unfair Trade Practices Act. Plaintiff's allegation that such state-law claims are "preempted by Federal Law including the Lanham Act because the state law claims are based upon the same conduct as the federal claim for infringement" fails under clearly established law and is impertinent.^[2] Defendant's Motion to Strike this affirmative defense is GRANTED, and Plaintiff's Twenty-Third Affirmative Defense is STRICKEN WITH PREJUDICE for failure as a matter of law.

In footnote number 2 to that opinion the Court noted that elements of trademark infringement, unfair competition, false designation of origin under the Lanham Act and California law were the same:

See, e.g., *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2007) (noting that the analysis for trademark dilution claims under "both federal and California state law... is the same"); *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, 998 F.Supp.2d 890, 897 (C.D. Cal. 2014) (noting that the elements of trademark infringement, unfair competition, and false designation of origin under the Lanham Act and California law were the same and thus could be combined into a single analysis); *Philip Morris USA Inc. v. Liu*, 489 F.Supp.2d 1119, 1123 (C.D. Cal. 2007) ("Proof of trademark infringement under the Lanham Act independently constitutes unfair competition under California law.").

Thus, there appears to be precedent to not dismissing all of the California State Law claims asserted in the Plaintiff's SAC, as the State Law Claims fall under the "intellectual property" exception in 47 USC 230(e)(2), are based upon federal trademark infringement law, and are are "substantially congruent" to the Plaintiff's Federal Claims under the Lanham Act.

WHEREFORE, in view of the arguments presented above---

1. Plaintiff asks that Defendants' Motion to Dismiss Counts I and II be denied for the reason that Plaintiff has pleaded and presented sufficient evidence (in the form of Exhibits) in the SAC to show that: Defendants made use of Plaintiff's trademark; such use was willful, unauthorized, and deliberate; such use was intended to interfere with Plaintiff's use of its trademark; and that such use became a source of confusion and deception to the public.

2. Plaintiff asks that Defendants' Motion to Dismiss Counts IV, V, VI (State Law Claims) be denied for the reason that Plaintiff has shown Defendant were not simply passive displayers of third party content, but were "developers" (under the Communications Decency Act 47 USC 230) of the FREE KICK MASTER apps they displayed in their advertisements. Additionally, the law presented above related to the CDA "intellectual property" exception would militate against dismissal of Plaintiff's State Law Claims in Counts IV, V, and VI of the Plaintiff's SAC.

Respectfully Submitted,

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